Ahmad Raduan bin Awang Bol v Public Prosecutor

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COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO Q–05–92 OF 1997
DENIS ONG, MOHD SAARI AND MOHD NOOR AHMAD JJCA
30 NOVEMBER 2002

B

Criminal Law *— Penal Code (Malaysia) — s 302 — Defence of sudden fight not considered by trial judge — Whether such omission constituted a misdirection*

Criminal Procedure *— Sentence — Culpable homicide not amounting to murder — Whether sentence of 18 years' imprisonment from the date of arrest manifestly adequate*

C

The appellant was convicted and sentenced to death in the High Court for murder under s 302 of the Penal Code. He appealed to the Court of Appeal. The Court of Appeal's perusal of the record of appeal revealed evidence pointing to a possible defence of sudden fight. The High Court judge had failed to consider this defence.

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Held, allowing the appeal against conviction and substituting therefor a verdict of culpable homicide not amounting to murder:

The evidence raised a possible defence of sudden fight as envisaged under exception 4 to s 300 of the Penal Code which the trial judge failed to consider. Such omission was tantamount to a misdirection. The killing was cold-blooded and a deterrent sentence of 18 years imprisonment from the date of arrest was manifestly adequate (see p 374E–F, H–I).

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[Bahasa Malaysia summary

Perayu telah disabit dan dijatuhi hukuman mati oleh Mahkamah Tinggi atas kesalahan membunuh di bawah s 302 Kanun Keseksaan. Beliau merayu kepada Mahkamah Rayuan. Semakan Mahkamah Rayuan terhadap rekod rayuan mendedahkan keterangan yang menunjukkan kemungkinan satu pembelaan pergaduhan tiba-tiba wujud. Hakim Mahkamah Tinggi telah gagal menimbangkan pembelaan tersebut.

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Diputuskan, membenarkan rayuan terhadap sabitan dan menggantikan dengan keputusan membunuh tanpa niat:

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Keterangan telah menimbulkan satu pembelaan pergaduhan tiba-tiba seperti yang dibayangkan di bawah pengecualian 4 kepada s 300 Kanun Keseksaan yang mana hakim perbicaraan telah gagal untuk mempertimbangkan. Kegagalan tersebut adalah satu ketidakadilan. Pembunuhan tersebut sangat kejam dan hukuman 18 tahun penjara dari tarikh ditangkap adalah memadai (lihat ms 374E–F, H–I).

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Notes

For cases on s 302 of the Penal Code (Malaysia), see 4 *Mallal's Digest* (4th Ed, 2000 Reissue), paras 1190–1233.

For cases on culpable homicide, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 3047–3053.

Cases referred to

Haji Talib v Public Prosecution [1969] 1 MLJ 94 (refd)

Legislation referred to

Penal Code ss 300, 302, 304(a),

Appeal from: Criminal Trial No 20–47–10 of 1995 (High Court, Sibu)

Hii Hieng Sing (*Hii & Co*) for the appellant.

Nurulhuda bte Mohamed Nor (Attorney-General's Chambers) for the respondent.

Mohd Saari JCA (delivering judgment of the court): This appeal is against the decision of the High Court of Sibu, Sarawak in which the appellant ('the accused') was convicted on a charge for a capital offence under s 302 of the Penal Code and was sentenced to death under the same section. At the conclusion of the hearing of this appeal, we unanimously reduced the charge to one under s 304(a) of the Penal Code.

The charge against the accused reads:

> That you, on 25 November 1994 at about 9.50pm at Kampung Tutus Hilir, Mukah, in the District of Mukah, in the State of Sarawak, committed murder by causing the death of one Awang Jamli bin Awang Sani (m) and that you have thereby committed an offence punishable under s 302 of the Penal Code.

Briefly, the facts of the case are that on 25 November 1994, after dark, Awang Jamil ('the deceased') went to have drink at Yong Kong coffee shop. He drank liquor in the company of PW6 and PW19. The accused also came to have drink at the coffee shop. The accused drank stout. While at the coffee shop, the accused asked for RM1.50 from the deceased. When the deceased did not oblige, the accused uttered the words 'kedekut', referring to the deceased.

Later that night, from the coffee shop, the deceased adjourned to the junction of Jalan Kampung Tutus Hilir and Jalan Kampung Bedanga, where the deceased indulged in a game of chess with PW6. The accused came to the scene but he left after a short while. However, later in the night, the accused came again at a time when the two persons were finishing their game and were about to disperse. It was at this point in time that a fight ensued between the accused and the deceased.

The following excerpts are taken from the appeal record at p 126:

> Q: Did Awang Jamil respond after you hit him with the axe?

A: Yes. We were struggling with each other.

Q: What happened in the midst of struggling?

A: Awang Jamil said 'Alang alang hamun kau berani cucuk terus'.

Q: What language was that?

A: Malay.

Q: Do you know the meaning?

A: The meaning is that since he had beaten him if he is daring then he should stab.

Q: On hearing this how did you feel?

A: I was very angry and I stabbed at his chest and back. He also punched me.

Further, evidence at p 138 of appeal record shows that during the fight the deceased knocked off the axe from the accused's hand which prompted the accused to seize the knife.

Adverting to the cautioned statement (D22), the accused said:

> Sejurus kemudian, Awang Jamil (si mati) hendak mengambil kapak dia menumbuk dada saya di sebelah kiri. Kemudian saya memukulnya dengan kapak di kepala. Si mati berkata 'kalau kau berani cucuk saya'.

On the defence of drunkenness and provocation (exception 1) as dealt with by the learned trial judge, we have no quarrel with his lordship's finding. However, what troubles us is with regard to the evidence as enumerated above. Based on the above evidence, it raised a possible defence of a sudden fight as envisaged under exception 4 to s 300 of the Penal Code, which the learned judge failed to consider (see *Haji Talib v Public Prosecutor* [1969] 1 MLJ 94). The said exception states:

> Exception 4 — Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Such omission, in our view, tantamounts to a misdirection.

At the time of the incident, the accused was armed with an axe and a knife. It is quite possible that had the learned judge directed his mind on exception 4, the very nature of the stab wounds inflicted on the deceased might be held to have taken the case out of the exception by reason of the accused appearing to have taken undue advantage of the deceased and having acted in a cruel or unusual manner. However, this was a question of fact for the learned judge to consider.

In the premise, and for reasons given above, we allow the appeal on conviction and substitute therefor a verdict of culpable homicide not amounting to murder, punishable under s 304(a) of the Penal Code.

On sentence, we agree with the learned deputy public prosecutor that this is a serious offence which cost the life of another human being. The killing was cold blooded and a deterrent sentence of 18 years imprisonment from 26 November 1994 (date of arrest) is manifestly adequate in the circumstances. We so impose the sentence. The order of the High Court for

A the disposal of exhibits as stated in (a) and (b), p 176 D of the appeal record is hereby affirmed.

Appeal against conviction allowed and a verdict of culpable homicide not amounting to murder substituted therefor.

B Reported by Andrew Christopher Simon

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